Office - Supreme Court, U.S.
FILED
MAY 23 1985
[redacted] STEVAS
CLERK

No. 84-1363

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMONWEALTH OF MASSACHUSETTS, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner challenges the court of appeals' ruling that the federal government is entitled to recoup a portion of advance Medicaid payments made to a state when those payments exceed the amount eventually determined to be due the state, but the state itself has been unable to obtain reimbursement from the Medicaid providers to whom it advanced excess funds for the provision of Medicaid services. Petitioner's argument is based on what it calls the "clear statement rule" of *Pennhurst State School & Hospital*

v. *Halderman*, 451 U.S. 1 (1981), under which, petitioner contends, any ambiguous term in a statute that authorizes federal grants to states must be construed in favor of the states.

1. To participate in the Medicaid program, a state must develop a Medicaid plan that is consistent with the requirements of the statute and the regulations promulgated thereunder. If the Secretary of Health and Human Services approves the state plan, she will provide the state with a grant in partial reimbursement of the amounts paid out under the plan to providers of medical assistance. 42 U.S.C. 1396a. Federal grants are paid in advance of each quarter, based on an estimate of the state's costs. 42 U.S.C. 1396b (d). Federal payments to a state are "reduced or increased to the extent of any overpayment or underpayment which the Secretary determines was made under this section to such State for any prior quarter" (42 U.S.C. 1396b(d)(2)).

Petitioner uses a similar system to pay Medicaid providers; it makes interim payments for the upcoming year at a rate based on estimates of the provider's costs, and then sets a final rate after the end of the year based on an audit of the provider's actual costs. If the final rate is lower than the interim rate already paid, petitioner collects the excess amount by adjusting the provider's interim rates for later years. Pet. App. 4-6.

When the Health Care Financing Administration (HCFA) of the Department of Health and Human Services audited petitioner's ledgers for the period from April to November 1979, it discovered that petitioner had made excess interim payments to a number of Medicaid providers and that it had never recovered from the providers the difference between the

interim payments and the final rates established by the state (Pet. App. 11-12). Accordingly, HHS reduced petitioner's next quarterly grant by the amount of these excess payments, concluding that they were "overpayment[s]" to the State within the meaning of Section 1396b(d)(2) (Pet. App. 8, 12). Petitioner objected, contending that an excess payment that it makes to a provider is not an "overpayment" unless and until it recovers the amount of that excess payment from the provider (*id.* at 9). While conceding that it must reimburse the Secretary for all excess payments actually recovered, petitioner took the view that there could be no "overpayments" in this case because the excess payments were made to providers that subsequently filed for bankruptcy or were otherwise unable or unwilling to reimburse the State (*id.* at 7, 9-10).

2. The Departmental Grant Appeals Board upheld HCFA's determination that the Secretary was entitled to reimbursement (Pet. App. 57-122). Petitioner then filed this action in the United States District Court for the District of Massachusetts, and the district court reversed the agency's decision (*id.* at 41-56). The district court found that the statute was ambiguous and determined that the ambiguity could be resolved only by examining the policies underlying the Act (*id.* at 49-53). When it turned to those policies, the district court concluded that the Secretary and the State ought to share the loss of unrecoverable Medicaid payments because Medicaid is a federal-state partnership (*id.* at 53-55).

The court of appeals reversed (Pet. App. 1-38). The court agreed with the district court that the statute was ambiguous, finding the "statutory arguments presented on both sides equally balanced" (*id.* at 31-

32). In these circumstances, the court resolved the issue in the Secretary's favor based on considerations of legislative and administrative policy (*id.* at 32). The court determined that Congress would have intended courts to give the Secretary's construction "significant weight" (*id.* at 35), particularly because Section 1396b(d)(2) "commands that federal grants be reduced 'to the extent of any overpayment . . . which *the Secretary determines* was made'" (Pet. App. 34 (emphasis in original)). The court also reasoned that "the weight of policy seems to us to fall on the side of the Secretary's interpretation" because petitioner "is clearly the party best able to minimize the risks resulting from dealing with insolvent providers" (*id.* at 35-36). Accordingly, placing the risk of loss on the state "increase[s] its incentive to take care, whereas the Secretary remains powerless to reduce the risks no matter what the costs imposed on her" (*id.* at 36-37).

In ruling for the Secretary, the court of appeals rejected petitioner's reliance on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1978), reasoning that "[w]e do not believe that *Pennhurst* requires that every arguably ambiguous provision conditioning the receipt of federal funds by a state be construed in the state's favor" (Pet. App. 29). In an analysis that foreshadowed this Court's decision in *Bennett* v. *Kentucky Dep't of Education*, No. 83-1798 (Mar. 19, 1985), the court of appeals explained its rationale as follows (Pet. App. 29-30):

> *Pennhurst* found the imposition of new conditions on the receipt of federal funds repugnant to the notion that by accepting the funds the state had thereby entered into a contract with the federal government and was entitled to have

> its bargain enforced as written. *Pennhurst*, 451 U.S. at 17. The present case involves not the imposition of a new condition on the state but the interpretation of the provisions governing the remedies available to the federal government. No principle of contract law requires us to construe such a provision consistently against a federal government obligee.

3. Virtually the only argument presented by petitioner is based on a reading of *Pennhurst* that this Court rejected in *Bennett* v. *Kentucky Dep't of Education*.[1] Accordingly, further review is unwarranted.

a. In *Pennhurst*, this Court held that grants to the states are "in the nature of a contract," the terms and conditions of which the states must "voluntarily and knowingly accept[]" (451 U.S. at 17). From this premise, the Court articulated the "clear statement rule" on which petitioner relies (Pet. 22 n.14). The Court held (451 U.S. at 17 (footnote omitted)):

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.

As noted, the court of appeals found *Pennhurst* distinguishable from the instant case. Nevertheless, petitioner contends that *Pennhurst*'s "clear statement rule" is applicable "to the interpretation of existing

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[1] The petition in this case was filed before the decision in *Bennett* v. *Kentucky Dep't of Education* was announced, and petitioner relies heavily not only on *Pennhurst* but also on the Sixth Circuit's decision that was reversed by this Court in *Kentucky* (see Pet. 47-48, 52-53).

conditions on the receipt of funds," and not just to "the determination whether a provision is a condition at all" (Pet. 42). This contention is no longer tenable in light of *Bennett* v. *Kentucky Dep't of Education*. There, as here, the dispute involved the interpretation of an existing condition of the grant program (the prohibition against using federal education funds to supplant state funds). The Court made it clear that *Pennhurst*'s "clear statement rule" had no bearing on that question of statutory interpretation (*Kentucky*, slip op. 8 (citation omitted; emphasis in original)):

> The requisite clarity in this case is provided by Title I; States that chose to participate in the program agreed to abide by the requirements of Title I as a condition for receiving funds. There was no ambiguity with respect to this condition, and *Pennhurst* does not suggest that the Federal Government may recover misused *federal* funds only if every improper expenditure has been specifically identified and proscribed in advance.

Thus, the "clear statement rule" prevents only the imposition on the states of "massive" and "largely indeterminate" financial obligations that the states could not have anticipated at the time they agreed to accept federal funding. *Pennhurst*, 451 U.S. at 24. The rule does not apply to the interpretation of arguably ambiguous terms in a statute that the states knew imposed obligations on them. Whether unrecovered excess payments that states make to providers are "overpayments" under the Medicaid statute clearly raises a dispute of the latter type. If the excess payments are "overpayments" within the meaning of the statute, there can be no doubt that peti-

tioner unambiguously agreed to abide by the requirement that the Secretary recoup the overpayments (42 U.S.C. 1396b(d)(2)).[2]

Finally, we note that there is nothing "unfair" about the court of appeals' resolution of this case. As the court noted (Pet. App. 36-37), only the state is in a position to protect itself against the risks of dealing with insolvent providers. Equally significant, a state is not required to employ the "retrospective ratesetting system" used by petitioner. Only 10 other states employ that method; the remainder employ a "prospective reimbursement system," under which providers are reimbursed on the basis of their costs in an earlier year and receive any necessary inflation adjustments later. See Pet. 8-10 & n.6.

b. Petitioner does not address the only issue left in this case after *Bennett* v. *Kentucky Dep't of Education*: whether the Secretary's interpretation of the term "overpayment" is reasonable. In any event, the court of appeals' decision on that issue is correct and does not conflict with any decision of this Court or

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[2] Petitioner cites *Board of Education* v. *Rowley*, 458 U.S. 176, 204 n.26 (1982), as another case in which *Pennhurst*'s "clear statement rule" was invoked (Pet. 45-46, 48 n.23). But that case was much closer to *Pennhurst* than to this case or *Bennett* v. *Kentucky Dep't of Education*. There, the lower courts had read a vague provision contained in the Education of the Handicapped Act, 20 U.S.C. 1412(1), directing participating states to provide handicapped children with a "free appropriate public education," as requiring local school districts to provide not just a useful education but one that would develop the handicapped child's full potential. Acceptance of the lower court decisions would have imposed a massive new obligation on the states, thereby fundamentally altering the character of the grant program and the states' duties under it.

any other court of appeals. Accordingly, it does not warrant review by this Court.

Relying on 42 U.S.C. 1396b(d)(3),[3] petitioner argued below that a state's excess payment to a provider is not an "overpayment" unless the state first collects the excess payment from the provider. But petitioner largely chose to ignore Section 1396b(d)(2), the subsection that deals generally with the subject of overpayments. The first sentence of Subsection (d)(2) requires the Secretary to recover the federal share of any overpayments made by states under the Medicaid program. Subsection (d)(3), on the other hand, authorizes federal recovery of payments that are proper, but that states choose to (but need not) recover from third parties, such as amounts from a recipient's estate. The two subsections thus apply to different situations. The instant case concerns payments under interim rates that were later determined to have been in excess of the amounts allowable under the Act. Congress cannot have intended for the federal government to make payments that turn out to be excessive once a state calculates its final reimbursement rate; indeed, the statute authorizes federal reimbursement only for "medical assistance" rendered under an approved state plan. 42 U.S.C. 1396b(a). Excess payments of the type involved in this litigation do not constitute payments for "medical assistance" within the meaning of the statute. See 42 U.S.C. 1396d(a). Accordingly, the term "overpayment" in Section 1396b(d)(2) necessarily includes the excess payments at issue here.

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[3] The relevant statutory provisions are set forth at Pet. App. 10 n.2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1985

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